

### REMARKS

This Preliminary Amendment accompanies a Request for Continued Examination (RCE) and is responsive to the final Office action mailed February 25, 2010.

Independent claims 45, 46 and 47 have been amended. Support for these amendments can be found, for example, in claim 2. Claim 48 is new and finds support, for example, in FIGS. 1-3 and in paragraphs [0080] and [0087] of the corresponding published application (2005/0006449). Claim 39 has been canceled. No new matter has been added.

Claims 2-6, 9-13, 15-31, 33-38 and 41-48 are pending. Applicant asks that all claims be examined in view of the amendment to the claims.

#### **Double Patenting**

Claims 2-6, 9-13, 15-26, 30, 31, 33-38 and 41-47 were provisionally rejected on the ground of nonstatutory double patenting as being unpatentable over claims 1-33 of copending Application No. 10/630,378.

Since this is a provisional rejection, Applicant respectfully requests that this issue be set aside until the other issues raised in the Office action have been resolved.

#### **Claim Rejections – 35 U.S.C. §112**

Claim 17 was rejected under 35 U.S.C. §112, second paragraph for being indefinite.

Claim 17, in relevant part, recites “wherein the at least two layers include an inner layer that is liquid tight and a further layer that is gastight.” The Office action states, “[i]t is unclear from this recitation if the liquid tight and gastight layers comprise the “two layers” or if the ‘further’ gastight layer is in addition to ‘the at least two layers.’” Applicant respectfully disagrees that claim 17 is indefinite. Without limiting the meaning of claim 17, Applicant points out that a person of ordinary skill would clearly understand that claim 17 is directed to an embodiment wherein the inner of the “at least two layers” is a liquid tight layer and an other layer of the “at least two layers” is gastight.

Applicant submits that claim 17, therefore, is not indefinite.

Claim 37 also was rejected under 35 U.S.C. §112, second paragraph for being indefinite.

Claim 37, in relevant part, recites, “wherein the container is a container to hold food and the print is visible only after food has been at least partially removed from the container.” The Examiner appeared to consider this claim to be indefinite because it did not positively recite the presence of food in the container. Applicant respectfully disagrees that the failure to positively recite the presence of food in the container renders this claim indefinite.

Without limiting the meaning of claim 37, Applicant submits that there is nothing indefinite about reciting that the container is a container to hold food and that the print on the container is visible only after the food has been at least partially removed. Clearly a person of ordinary skill would understand the scope of this claim. Moreover, positively reciting the presence of food in the container would unduly limit the scope of the claim because the feature: “the print being visible only after whatever food may have been in the container has been at least partially removed from the container” is present whether or not food is present in the container.

For at least the foregoing reasons, Application submits that claim 37 is not indefinite.

Claim 39 also was rejected under 35 U.S.C. §112, second paragraph for being indefinite.

Claim 39, in relevant part, recites, “wherein the opening is partially formed.” The Office action states that it is unclear how the opening edge of the container can be “partially formed” since claim 45, from which claim 39 depends, states that the container is “surrounded by” the opening edge.

Applicant has canceled claim 39.

In view of the foregoing comments, Applicant requests reconsideration and withdrawal of all of the rejections under 35 U.S.C. §112, second paragraph.

### **Claim Rejections – 35 U.S.C. §102**

Independent claim 46 and its dependent claims 3-6, 11-13, 15-22, 24, 26-30, 33, 34, 36, 39 and 41-44 were rejected under 35 U.S.C. §102(b) as anticipated by U.S. Patent No. 2,235,963 (McGirr). In view of the following remarks, Applicant respectfully traverses these rejections.

Claim 46 recites a container with a container wall that has at least two layers of a transparent, fluid tight polymer material, wherein the container and the material are dimensionally stable and fluid tight from -50°C to +120°C.

In a typical implementation, the claimed subject matter provides a container that is suitable for a wide variety of applications. For example, the higher end of the recited temperature range makes the container suitable for use in pasteurizing the contents of the container. See paragraph 0062 of the published application (2005/0006449). Additionally, the lower end of the recited temperature range makes the container suitable for use in applications where its contents are placed in the container at relatively higher temperatures (e.g., above 0°C), but subsequently cooled down quickly (e.g., shock frosted) to a temperature below 0°C. This technique typically helps provide a long shelf life for the product and helps ensure that the quality of the product is maintained between its production site to the shop where it is sold and beyond until it is finally consumed at a later time.

The McGirr patent does not disclose or suggest the claimed subject matter.

The Office action acknowledged that the McGirr patent is silent regarding the dimensional stability and fluid tightness of the McGirr container between -50°C and +120°C. The Office action alleges, however, that somehow the McGirr container is “inherently” dimensionally stable and fluid tight from -50°C to +120°C. As discussed below, this is simply not correct.

Inherency requires that “the missing descriptive matter [be] necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill.” *In re Robertson*, 169 F.3d 743, 745, 49 USPQ2d 1949, 1950-51 (Fed. Cir. 1999) (emphasis added). Moreover, “[t]he fact that a certain result or characteristic may occur or be present in the

prior art is not sufficient to establish the inherency of that result or characteristic.” *Manual of Patent Examining Procedure*, § 2112, citing *In re Rijckaert*, 9 F.3d 1531, 1534, 28 USPQ2d 1955, 1957 (Fed. Cir. 1993).

Nothing in the McGirr patent indicates or even suggests that the container is dimensionally stable and fluid tight from -50°C to +120°C. Certainly, this concept is not “necessarily present” in the McGirr patent. For at least the foregoing reasons, Applicant submits that the Office action’s allegation that the McGirr container is dimensionally stable and fluid tight from -50°C to +120°C is improper and, therefore, should be withdrawn.

Claim 46 should be allowable for at least the foregoing reasons.

Claim 46 should be allowable for the following additional reasons as well.

The container wall in claim 46 is “formed from a blank having at least two layers of a transparent, fluid tight material . . . [that is] dimensionally stable and fluid tight from -50°C to +120°C.”

An example of the claimed subject matter is shown in FIG. 3 of the present application, which shows an exemplary cross-sectional view of a container wall 6. The illustrated wall has three layers (i.e., an outer layer 3, a central layer 4 and an inner layer 5). In a typical implementation, each of these layers 3, 4, 5 is dimensionally stable and fluid tight. *See* paragraph 0062 of the published application (2005/0006449).

As Applicant previously argued in response to the Office action mailed August 7, 2009, the McGirr patent does not disclose or render obvious the claimed subject matter. Instead, the McGirr patent discloses a container formed from a single sheet of a transparent cellulose material. *See* McGirr, col. 1, lines 4-6. Once the container has been formed, the interior of the container is sprayed with a medium to sterilize and moisture-proof the container. *See* McGirr, col. 4, lines 16-35. The Examiner appears to contend that this spray coating constitutes a second transparent layer. *See* Detailed Action, Page 10, Paragraph 22. However, even if the spray coating can be seen as a second layer, it is not dimensionally stable and fluid tight from -50°C to

+120°C layer, as recited in claim 46. Indeed, the mere fact that it is sprayed indicates that the spray coating lacks any dimensional stability.

In the February 25, 2010 final Office action the Examiner essentially rejected this argument because the claim language, “a container wall . . . formed from a blank having at least two layers of a transparent, fluid tight material . . . [that is] dimensionally stable and fluid tight from -50°C to +120°C” was considered to be a product-by-process limitation. Moreover, the Examiner appears to have concluded that somehow the “product” that would result from the claimed “process” was identical somehow to the “product” disclosed in the McGirr patent. As discussed below, this is not correct.

Even if the foregoing claim language represented a “product-by-process” limitation, which Applicant does not concede, the container wall that would result from the claimed “process” would include at least two layers that are made from a transparent, fluid tight material that is dimensionally stable and fluid tight from -50°C to +120°C. This feature is clearly absent from the McGirr container, which instead has only a single sheet of a transparent cellulose material and a spray coating on the single sheet to sterilize and moisture-proof the container. As discussed below, neither the transparent cellulose material nor the spray coating is a transparent, fluid tight polymer material that is dimensionally stable and fluid tight from -50°C to +120°C.

The transparent cellulose material is not a fluid tight material. This is evidenced by the fact that the spray coating needs to be added in order to moisture-proof the container. Without the spray coating, the transparent cellulose material is not moisture-proof and, therefore, not fluid tight. The spray coating is not dimensionally stable as evidenced by the fact that it is “sprayed” onto the container. Thus, neither the transparent cellulose material nor the spray coating is a transparent, fluid tight material that is dimensionally stable and fluid tight from -50°C to +120°C, as recited in claim 46. Clearly, then, the McGirr container does not have “at least two layers of a transparent, fluid tight material . . . [that is] dimensionally stable and fluid tight from -50°C to +120°C,” which would be present in the container produced according to what the Examiner considers to be the foregoing “product-by-process” limitation.

Claim 46 should be allowable for the foregoing additional reasons as well.

Claims 3-6, 11-13, 15-22, 24, 26-30, 33, 34, 36 and 41-44 depend from claim 46 and, therefore, should be allowable for at least the same reasons as claim 46.

Independent claims 45 and 47 also were rejected under 35 U.S.C. §102(b) as anticipated by U.S. Patent No. 2,235,963 (McGirr).

Each of these independent claims recites subject matter similar to the subject matter discussed above with reference to claim 46 and, therefore, should be allowable for at least the same reasons as claim 46.

Claim 45, for example, recites a container with a container wall that has at least two layers of a transparent, fluid tight polymer material wherein the container and the material are dimensionally stable and fluid tight from -50°C to +120°C. Moreover, the container wall of claim 45 is "formed from a blank having at least two layers of a transparent, fluid tight material [that is] dimensionally stable and fluid tight from -50°C to +120°C."

Similarly, claim 47 recites a container with a container wall that has multiple layers of at least one compound which is transparent and dimensionally stable and fluid tight from -50°C to +120°C. Additionally, the container of claim 47 is "formed from a blank[, which is] formed from multiple layers of [a] compound which is transparent and . . . dimensionally stable and fluid tight from -50°C to +120°C."

As discussed in detail above with reference to claim 46, the McGirr patent does not disclose or suggest the claimed subject matter.

Claims 45 and 47 should be allowable for at least the same reasons.

### **Claim Rejections – 35 U.S.C. §103**

Claims 2, 9, 10, 23, 25 and 31 were rejected under 35 U.S.C. §103(a) as unpatentable over the McGirr patent in view of U.S. Patent No. 3,934,749 (Andrulionis).

Claims 2, 9, 10, 23, 25 and 31 depend from claim 46, which recites:

- a container with a container wall that has at least two layers of a transparent, fluid tight polymer material, wherein the container and the material are dimensionally stable and fluid tight from -50°C to +120°C; and
- a container wall that is “formed from a blank having at least two layers of a transparent, fluid tight material . . . [that is] dimensionally stable and fluid tight from -50°C to +120°C.”

As discussed above, the McGirr patent does not disclose or render obvious the claimed subject matter. Nor does the Andrulionis patent, alone or in any reasonable combination with McGirr, disclose or render obvious the claimed subject matter.

The Andrulionis patent discloses a covered plastic container with an outwardly bent upper rim. Suitable materials for manufacture of the container include: polyethylene-polystyrene, HIPS-polyethylene, ABS-polypropylene, Polystyrene-PVC and polyethylene-PVC. (2:60-3:4).

The Andrulionis patent does not disclose the claimed subject matter pointed out above, which is absent from the McGirr patent. Nor does the Office action allege anything to the contrary.

Claims 2, 9, 10, 23, 25 and 31 should be allowable for at least the foregoing reasons.

Claim 38 was rejected under 35 U.S.C. §103(a) as unpatentable over the McGirr patent in view of the Andrulionis patent.

Claim 38 depends from claim 45, which recites

- a container with a container wall that has at least two layers of a transparent, fluid tight polymer material wherein the container and the material are dimensionally stable and fluid tight from -50°C to +120°C; and
- a container wall that is “formed from a blank having at least two layers of a transparent, fluid tight material [that is] dimensionally stable and fluid tight from -50°C to +120°C.”

As discussed above, the McGirr patent and the Andrulionis patent, alone or in combination, do not disclose or render obvious the claimed subject matter.

### Conclusion

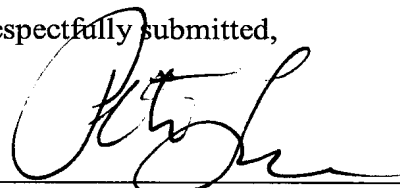
It is believed that all of the pending claims have been addressed. However, the absence of a reply to a specific rejection, issue or comment does not signify agreement with or concession of that rejection, issue or comment. In addition, because the arguments made above may not be exhaustive, there may be reasons for patentability of any or all pending claims (or other claims) that have not been expressed. Finally, nothing in this paper should be construed as an intent to concede any issue with regard to any claim, except as specifically stated in this paper, and the amendment of any claim does not necessarily signify concession of unpatentability of the claim prior to its amendment.

A Petition for a Three-Month Extension of Time is enclosed. The required petition fee in the amount of \$1,110.00, the required RCE fee in the amount of \$810 and the excess claims fee in the amount of \$272 are being paid concurrently herewith on the Electronic Filing System (EFS) by way of Deposit Account authorization. Please apply any other charges or credits to deposit account 06-1050.

Date: \_\_\_\_\_

8-25-10

Respectfully submitted,



\_\_\_\_\_  
S. Peter Ludwig  
Reg. No. 25,351

Customer Number 26211  
Fish & Richardson P.C.  
Telephone: (212) 765-5070  
Facsimile: (877) 769-7945